IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 213 of 2011

IN THE MATTER of Section 17(1)(a) of the Time Share Act, Laws of Belize.

AND

IN THE MATTER of the recognition and enforcement of rights of timeshare members.

1. **LINCOLN CANE VENTURES, LLC** **CLAIMANTS**
2. **FEDERIC SPEAKER**
3. **GLENN R. HAMILTON TRUST**
4. **DANIEL RUSSELL**
5. **JOHN MIDLEN, et al**

AND

BRITISH CARIBBEAN BANK INTERNATIONAL LIMITED **1st DEFENDANT/ ANCILLARY CLAIMANT**

MARK HULSE (IN HIS CAPACITY AS RECEIVER OF SUENO DEL MAR LIMITED) **2nd DEFENDANT**

SUENO DEL MAR LIMITED (IN RECEIVERSHIP) **1st ANCILLARY DEFENDANT**

JAGUAR RESORTS LLC **2nd ANCILLARY DFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

By written submissions filed on:
25.6.2015 by the Claimants
26.6.2015 by the Defendants.

Keywords: Costs – Prescribed Costs – Valuation – Costs Order

Mr. Michael C.E. Young SC along with Mr. Yohhahnseh Cave for the Claimants.
Mr. Eamon Courtenay SC along with Ms. Pricilla Banner for the first Defendant/Ancillary Claimant.
Mrs. Magali Marin-Young for the second Defendant.

DECISION

1. This was an inherited matter of some vintage. During a further case management conference, requests were made by the parties for the trial to be bifurcated. The court agreed and subsequently, a judgment, in favour of the Defendants, on certain preliminary issues, was delivered. At that time the court sought the assistance of counsel, on both sides, with the precise terms of the order following that judgment. On conclusion of this exercise, all that was left to be determined were costs and one outstanding claim.

2. The Defendants submitted that the costs issue had already been settled by a previous judge. On file there is an application by the Defendants for security for costs. That application had been amended to include the valuing of the claim for the purposes of prescribed costs.

3. Following a hearing, the learned trial judge delivered a written decision which begins:

> *"This is a ruling on an interlocutory application for security for costs by the defendants in the claim which was brought by one hundred and fifty-four claimants for declarations that they have rights to timeshare property in Belize valued, according to the statement of case, in excess of US 17 million dollars."*

4. Having established his aim, the judge goes on to state at paragraph 3: *"The value of the timeshare rights purchased by the claimants in accordance with the agreement exceeded according to the claimants, US$17,000,000."*

5. It is important to note that the entire thrust of the decision remains consistent with the opening statement. Throughout, is a systematic discussion of security for costs and the principles which guide a court in its consideration of such an application. Although he spends considerable time on the value of the Claimants' chattel, it is ultimately towards a decision on whether they had property within the jurisdiction which could be used to satisfy an order for costs.

6. He concludes at paragraph 12 that in the circumstances it would be just to make an *"order for security for costs in this matter."* Then he goes on to consider *"the amount and nature of the security for costs."* He says this at paragraph 14 – *"The claimants in the statement of claim ask for reliefs in the nature of orders and declarations, including a declaration that the claimants timeshare agreements and timeshare rights be recognized and enforce. The total value of all the claimants and other timeshare rights in the property which they want to enforce, amounts to US$17,913,000.50 according to appendix 1 of the amended statement of claim".*

7. Then comes the controversial paragraph 15 – "*The defendants request prescribed costs under Rule 64.5. The court has to decide the value of the claim for the purpose of determining the amount of the prescribed costs: Rule 64.5(2). Where a defendant applies for such costs, the value of the claim is the amount claimed by the claimant in the claim form: Rule 64.5 (2)(b)(i) If the claim is not for a monetary sum, as is this claim, the value of the claim is to be treated as a claim for $50,000 unless the court makes an order under Rule 64(6)(1)(a). Rule 64.5 (2)(b)(iii). As mentioned above, the defendants*

showed that the cumulative value of the timeshare rights in the property is US$17,913,000.01. The claimants in the amended claim form have given a value of the claim as US$17,913,000.50. ***I therefore rule that the value of the claim as stated by the claimants, is US$17,913,000.50. They have not denied the type of costs applied for by the defendants, though the claimants have opposed the payment of security for costs.*** *Using this value of the claim, the amount of security for costs, using the principles of prescribed costs, would be in the amount of BZ$5,268,156.39 as shown in the fourth affidavit for second defendant." (emphasis mine)*

8. Following that written decision, an order was perfected and entered. It reads:

> 1. *Each Claimant mentioned in column 1 of the schedule attached herewith shall pay into court not later than 16th April, 2012 the security for costs mentioned for the Claimant in column 2 of the said schedule, and that payment shall be the security for costs in respect of both defendants in equal shares;*
> 2. *The claim in this matter is stayed until 17th April, 2012,*
> 3. *Where any Claimant fails to pay the security for costs in accordance with (1) above the claim with respect to that Claimant is struck out as from 17th April, 2012 and*
> 4. *This matter is fixed for Report on 20th April, 2012 at 9:00 a.m.*

9. Neither the order at the end of the judgment, nor the perfected order (which was practically a reproduction), stated anything about the value of the claim or the applicable costs in the matter. They both refer to a schedule which clearly uses the US$17,913,000.50 to calculate the prescribed costs. That figure was then used to determine, proportionately, the amounts to be paid in by each Claimant as security for costs. Unsurprisingly, that figure is BZ$5,268,156.39. It is the very same figure which appears in the very last sentence of paragraph 15. There can be no doubt that the security for costs

order was made on the value of the claim being US$17,913,000.00. Although the perfected order is silent, did the judge likewise made an order valuing the claim and establishing a cost regime?

10. The problem, in my view, began with the terms of the perfected order and neither counsel sought clarification, if necessary, or correction. To compound matters, the perfected order was then appealed. Although the grounds for appeal speak to the possible incorrect value having been placed on the claim, that part of the decision (if made) was certainly not specifically appealed. The parts of the decision appealed against, as succinctly stated in the Claimants' application to the Court of Appeal, was:

> *(a) That each Claimant mentioned in Column 1 of the schedule attached (to the Order) shall pay into court no later than 16th April 2012 the security for costs mentioned for that Claimant in column 2 of the said schedule, and that payment shall be the security for costs in respect of both defendants in equal shares; [amounting to an aggregate of BZS$5,268,156.30 required as security for costs];*
> *(b) The claim is stayed until 17th April 2012;*
> *(c) Where any Claimant fails to pay the security for costs in accordance with (1) above the claim with respect to that Claimant is struck out as from 17th April 2012.*

11. It is clear, therefore, that only the security for costs orders were appealed. The Court of Appeal considered the matter and made an order accordingly. I am unaware of any reasons for decision, if any were given. No perfected order was exhibited by either side and none appeared on the court file. However, from both sets of submissions, it seems, the order was made in the following terms:

> *"1. The appeal is allowed.*
> *2. The order of the judge in the Court below is set aside and the claim is reinstated.*

3. *The Appellants are to pay security for costs to the Respondents in the sum of BZ$200,000 by paying such sum into a US dollar bank account under the control of Youngs Law Firm, within six weeks, that is to say 42 days from today's date, and in default of such payment, the claim shall stand struck out.*
4. *Each party shall bear its, her, his costs in the appeal; and*
5. *Costs in the Court below up to today's costs, shall be costs in the cause."*

12. It is the contention of the Defendants that the ruling made, as to the value of the claim and prescribed costs, by Justice Legall, having not been appealed, remain good. It must therefore be followed by this court. I state their contention in this manner, because their submissions seemed to be somewhat contradictory. On page 2 to 3 they state that Legall J ruled that *"(i) the 154 Claimants must give the Defendants security for costs, (ii) that the claim was stayed until 17th April, 2012 pending payment in default of which, the claim be struck out on that date and (iii) the claim was valued at US$17,913,000.50. The Claimant accepts that prescribed costs applies."* They go on to state at paragraph 20 – "*The value of the claim had already been settled by Legall J."* Yet they state at paragraphs 1 and 2 on page 9, in reference to the same order quoted in this present judgment at paragraph 10 ibid – *"It was therefore only the foregoing orders that were made by Justice Legall that were set aside by the Court of Appeal's order in Civil Appeal No. 23 of 2012, and his* ***reasoning*** *was not set aside … Since the Court of Appeal ordered that "the order of the judge in the court below is set aside," this does not mean that the valuation of the claim by Justice Legall was overturned. The orders of Justice Legall were as to the sums to be said as Security for costs. It is thus submitted that Justice Legall's valuation of the claim should stand."* (emphasis mine)

13. The Claimants, on the other hand, maintain that the judge never valued the claim or made any order for prescribed costs. In any event, the order of the Court of Appeal nullified the original decision of the High Court so it is therefore no longer a valid order. Consequently, it is now open to the court

to make any order for costs that it feels just. They urge that the claim should be valued at BZ$50,000 in accordance with Rule 64.5 (2)(b)(iii) if costs are to be prescribed.

14. At this juncture, it seems, Justice Legall's words at paragraph 15 fall to be construed. They must, however, be considered in light of the entire judgment and particularly, the order he deemed it necessary to make and to approve.

15. The sentence, on which the Defendants rely, reads:

> *"I therefore rule that the value of the claim as stated by the Claimants, is US$17,913,000.50."*

16. What ought to have been an issue of law now becomes an issue of semantics and punctuation. Both of which ordinarily would perhaps be petty issues. Today however, they spell the difference in a costs order.

17. It is the measured view of this court that had the learned judge simply inserted a comma at claim, one could be in agreement with the Defendants. One would perhaps have been constrained to overlook that the judge's own order states nothing specific in response to the application for a value to be set and a cost regime to be determined. Such an order should ordinarily follow. One may likewise have been forced to forget what he himself stated the object of his judgment to be. He was clear and resolute. And, finally one may have had cause to overlook the entire security for costs thread that ran through that judgment. A judgment in which he was quite detailed and concluded with a full security for costs order.

18. But because there is no comma, one must begin by assuming that the judge has said what he means and means what he has said. As those words appear and as I interpret them, the judge was simply stating that he accepts that the Claimants have asserted the value of their claim as US$17,913,000.50. It is no different to what he stated at paragraphs 3 and 4 of his judgment (excerpts ibid).

19. He never says that he valued the claim at US$17,913,000.50. His statement falls just short of what is required by way of an order in this regard. When he continues on, to assess the amount of security for costs, using the prescribed costs basis, I am fortified in my view. Again he falls short of ordering that costs in the matter should be prescribed costs. When this is considered in light of the order he eventually makes, this court can only find that his intention was only to deal with the security for costs issue. I dare not speculate as to why this was done, that is not for me.

20. Nonetheless, the Defendants, who are now seeking to have the valuation and costs order applied, never sought to have that order perfected. Had that been done in compliance with the rules of court, this entire matter could well have been avoided. One wonders whether or not they realized that the order did not address their application as perhaps their own draft order should have. One also wonders, if the parties had agreed to prescribed costs, why such a consent order had never been filed. Certainly we would not have been here today had any of this been done.

21. As such, I find that the order of the learned judge addressed only the security for costs issue. All else was simply his reasoning towards arriving at what he considered to be a fair figure for that security. He made no order as to the

applicable costs nor did he value the claim for that matter. Moreover, he used the US$17,913,000.50 as the basis for his calculation only. The Court of Appeal having been willing to set aside his order, obviously found fault with some aspect of his assessment.

22. The Defendants presented the ECSC Court of Appeal cases ***Astian Group Inc et al v Alfa Petroleum Holdings Ltd Civil Appeals No. 11 and 17 of 2004***. Here Barrow JA considered whether a separate and actual valuation of a claim had to be undertaken in circumstances where the appellants had asserted the value of their claim not only to the High Court but also to the Court of Appeal. Barrow J had this to say paragraph 6:

> *"There was no need for an application to stipulate or determine a value when the Claimants themselves stated to the court what was the value of their claim. It is simply not open to the appellants now to say that the value of their claim was never determined."*

23. This present case is night to day from what transpired in ***Astian***. This court could find no evidence that the Claimants admitted or relied on the value of $17,913,000.50 as the value of their claim. That seemed simply to be the reasoning Legall J relied upon for determining the quantum for security for costs. An order which the Court of Appeal wasted no time in setting aside. Even at the Court of Appeal level the Claimants raised that this value had been wrongly used.

24. I therefore agree with the Claimants that the value of this claim was never determined and costs remain an open issue before the court. It falls to be considered in its entirety. I state, immediately, that I reject the Claimants'

submissions that $50,000 should be used to calculate prescribed costs. They are well aware that they included in their claim form a claim for damages which would take them outside Rule 64.5 (2)(b)(iii). In ***Bradford Noel v First Caribbean International Bank (Barbados) Ltd. Grenada – Civil Appeal No. 29 of 2006***, a similar contention was raised by the appellants. Barrow JA considered the identically worded ECSC Rule and concluded at paragraph 17:

> *"This argument ignores the obvious truth that a claim, for a monetary sum that is as yet unascertained. The reference to a claim for a monetary "sum" is really a reference to a claim for a monetary "award"; they mean the same thing in this context. Therefore Sub-rule 2 (b)(iii) which deals with that is not a claim for a monetary sum could not be applicable; this was a claim for a monetary sum."*

25. The Claimants, in paragraph 4 of their submissions state: "*It can be seen then that the essential relief claimed by the Claimants was that their rights under the Time Share Act and/or under the Membership Agreements be recognized and respected ... The reliefs include a claim for damages but that claim is incidental."* They seem to be brazenly attempting to change the Rule by adding 'essential' to 'relief claimed' and 'manifestly' and 'incidental' to 'the claim'. Such an interpretation is outrightly rejected.

26. I likewise reject their submission that the Defendants all had the same interest in relation to the proceedings. It is trite that The Receiver is an agent of the Company and not of the Bank that appointed him. Moreover, by way of solitary example, what could The Receiver possibly say to the mortgage issue raised by the Claimants. I shall say no more.

27. To my mind the overriding objective demands, that costs be assessed pursuant to Rule 64.12, if not agreed.

29. **IT IS HEREBY ORDERED:**

1. Costs to each Defendant to be paid by the Claimants.
2. Such costs to be assessed if not agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT
30.7.2015